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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

TIMEFIRE, INC., Plaintiff and Respondent, v. AQS ENGINEERING, INC., et al., Defendants and Appellants.	A152584 (Alameda County Super. Ct. No. RG14743063)

This appeal arises out of a suit for breach of contract by TimeFire, Inc. (TimeFire) against AQS Engineering, Inc. and All Quality & Services, Inc. (collectively AQS). TimeFire sought damages of $550,000 for AQS's failure to deliver 222 of 300 circuit boards that AQS was contractually obligated to assemble and deliver to TimeFire. The jury returned a verdict for TimeFire and awarded damages of $337,000. This appeal is from the judgment in TimeFire's favor and the denial of AQS's motion for judgment notwithstanding the verdict (JNOV) or in the alternative for a partial new trial on damages. We affirm.

I. FACTS

TimeFire, which specializes in designing and building "very math-intensive" printed circuit boards (PCBs), is a small firm consisting of two full-time employees. At the time of the events in question it was a start-up enterprise. AQS, a PCB manufacturer, contracts with hardware designers like TimeFire to produce PCBs designed by those companies. HashFast is a central processing unit (CPU) chip designer and manufacturer.

The heart of the PCB architecture around which the boards at issue here were designed is a HashFast CPU.

In 2013, TimeFire developed a PCB aimed at performing complex, ultra-high-speed calculations to assist end users with "mining" Bitcoin cryptocurrency—a process by which the calculation and decoding abilities of computers are used to maintain a public ledger as transactions occur within the cryptocurrency's network, and in return the owners of the computers performing the calculations are rewarded with Bitcoin.

TimeFire contracted with AQS to manufacture 300 of these specialized PCBs. As specified by the design, the PCBs were to be manufactured using HashFast CPUs. It was agreed that HashFast employees would be present at the AQS manufacturing site to assist with the production of the PCBs, assist with modifications to the PCB design as necessary to make the boards function at the required calculation standard, and to test the final boards according to performance benchmarks. After assembly, AQS was to deliver 300 PCBs to TimeFire.

The delivery was to take place in stages. TimeFire ordered an initial run of prototypes to demonstrate that the PCBs were capable of performing the necessary calculations at a rate of 800 gigahash per second. Upon delivery of these 58 prototypes, TimeFire assessed their function in the field based on customer feedback from Binary Financial, which purchased 48 of the PCBs in advance. TimeFire did first-hand performance assessment on the remaining 10 boards through independent testing.

Following this prototype run and field demonstration, AQS produced 222 more PCBs but failed to deliver them to TimeFire, instead mistakenly delivering them to HashFast. Upon receipt of the misdelivered PCBs, HashFast sold the boards, kept the profit, and went bankrupt.[1] TimeFire then sued AQS for breach of contract, seeking damages of $550,000. The jury returned a damages verdict for TimeFire, apparently

[1] As noted, TimeFire ordered 300 PCBs and 58 were delivered, with 222 misdelivered to HashFast. Those 222 boards form the basis for TimeFire's claim against AQS. According to TimeFire's counsel's explanation at oral argument, the remaining 20 PCBs did not survive the manufacturing process due to a "yield problem."

using as a benchmark TimeFire's sale of PCBs to Binary Financial for $2,500 each, but "discounted" to the $1,500 price HashFast charged, producing damages of $337,000 (approximately $1,500 X 222). This timely appeal followed.

II. DISCUSSION

A. Standards of Review

When an appellant challenges the sufficiency of evidence supporting a jury verdict, this court's authority "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Likewise, when reviewing a trial court's denial of a motion for a JNOV pursuant to Code of Civil Procedure section 629, this court's sole duty is to view the record "in the light most favorable to" the jury's verdict and determine whether substantial evidence supports the verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) A JNOV "may be granted," or a denial of a JNOV reversed, "only if it appears . . . that there [was] no substantial evidence" presented at trial to support the jury's conclusion. (*Ibid.*)

Upon reviewing the " 'whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court,' " a judgment will be overturned, or the denial of a JNOV reversed, only if we conclude that the jury was not provided any " ' "evidence . . . of ponderable legal significance" ' " that was " ' "reasonable in nature, credible and of solid value." ' " (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336 (*DiMartino*).) "The focus is on the quality, not the quantity, of the evidence." (*CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 787.)

By contrast, we review the order on a new trial motion for abuse of discretion. "Ordinarily, a trial court has complete discretion in ruling on a motion for a new trial" and "[i]ts ruling will not be disturbed absent an abuse of discretion." (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452.) " ' "The appropriate test for abuse

of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.) " '[U]nless a clear case of abuse is shown *and* unless there has been a miscarriage of justice' " the trial court's ruling will not be disturbed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, italics added.)

B. Analysis

1. *The Damages Are Supported by Substantial Evidence In the Record and Are Not Speculative Under Sargon*

The primary argument AQS advances on appeal is an attack on the sufficiency of the evidence to support the $337,000 damages award. For this line of argument, AQS relies heavily on *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). At issue in *Sargon* was a contract under which the University of Southern California (USC) agreed to conduct a five-year clinical study of a dental implant that Sargon had designed and patented. (*Sargon*, *supra*, 55 Cal.4th at p. 754.) Sargon claimed that USC breached its contractual obligation by failing to provide Sargon proper reports of the clinical trials showing the initial success of the dental implant. (*Ibid*.) At trial, the jury awarded Sargon $433,000 in compensatory damages. (*Ibid.*) This award was far below the lost profits amount that Sargon sought. (*Id*. at pp. 753, 755.)

On appeal, Sargon contended the trial court abused its discretion by excluding the expert testimony of James Skorheim, a certified public accountant and attorney, who estimated that Sargon's lost profits as a result of the breach " 'ranged from $220 million to $1.18 billion.' " (*Sargon*, *supra*, 55 Cal.4th at pp. 753, 755.) Skorheim's testimony invited the jury to compare Sargon, a tiny company with a tiny market share, to the largest six companies in a global industry. (*Id.* at p. 766.) Underlying Skorheim's approach was the assumption that there is no " 'meaningful difference between [the] biggest and smallest' " of Sargon's competitors. (*Ibid*.) Furthermore, " 'Skorheim admittedly shunned historical performance and comparison to companies of similar size

and financial situation, choosing instead to compare [Sargon] to multi-national industry giants' " and treating them as similar when they were "not comparable." (*Id*. at pp. 766, 777–778.)

Reversing a determination by the Court of Appeal that Skorheim's testimony was admissible, the Supreme Court explained " 'that damages for the loss of prospective profits are *recoverable where the evidence makes reasonably certain their occurrence and extent*.' [Citation.] Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' [Citation.] The rule that lost profits must be reasonably certain is a specific application of a more general statutory rule. 'No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.' (Civ. Code, § 3301; [citation].)" (*Sargon, supra,* 55 Cal.4th at pp. 773–774, italics added.)

Skorheim's proffered testimony, the court held, was " 'insufficient to show that [Sargon] was an established business or had a track record' " that would allow the jury to infer the company would obtain the enormous market share that Skorheim predicted. (*Sargon, supra,* 55 Cal.4th at p. 775, quoting *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 763; see *Sargon,* at pp. 776–781.) His flawed comparison to companies with well-established track records "relied 'on data that in no way [was] analogous' " to the plaintiff in that case. (*Sargon, supra*, 55 Cal.4th at p. 776.) The testimony was entirely "speculative" because he "did not base his lost profit estimates on a market share Sargon had ever actually achieved. Instead, he opined that Sargon's market share would have increased spectacularly over time to levels far above anything it had ever reached." (*Ibid*.) It "provided no logical basis to infer that Sargon *would* have achieved that market share" (*id*. at p. 781), "it 'involved numerous variables that made any calculation of lost profits inherently uncertain' " (*id.* at p. 780), and as a result, it was "inherently speculative" (*ibid.*).

Sargon does not call for reversal here, first and foremost because there is ample evidentiary foundation in this record for the damages award to TimeFire.

The evidence shows that AQS agreed to build 300 PCBs for TimeFire at a cost of $28,950 using HashFast chips. TimeFire paid AQS the full amount prior to any work being performed by AQS. There was testimonial evidence of the agreement and the advance payment; and there was documentary evidence of a purchase order from TimeFire to AQS (an invoice and receipt from AQS to TimeFire confirming the agreement and payment, and TimeFire's bank statement showing payment to AQS). AQS delivered 58 of these 300 boards to TimeFire. There was also testimonial evidence that TimeFire sold 48 of the first 58 boards in advance to Binary Financial for $2,500 apiece. Also in the record was testimony and an invoice produced by TimeFire proving the sale to Binary Financial.[2]

Satish Ambati, former Chief Technology Officer of TimeFire, testified that on April 2 he received a call from Kim Martin of AQS informing him that 222 additional boards were ready to be picked up. When Ms. Martin called him to pick up the boards, Mr. Ambati specifically told her not to give the PCBs to anyone at HashFast or let anyone from HashFast touch them. Testimony by AQS witnesses and a recorded phone call between Mr. Ambati and Bruce Lee, Director of Operations at AQS, confirm both that Ms. Martin was informed not to release the boards to HashFast, and that Ms. Martin immediately made her colleagues at AQS aware of those instructions. AQS nonetheless delivered the 222 PCBs to HashFast against Mr. Ambati's instructions. HashFast—with full knowledge of the misdelivery—then sold the PCBs for $1,500 apiece. HashFast's Chief Financial Officer admitted at trial that HashFast took delivery of the boards while it was in the midst of a financial crisis, and that it sold them to pay its own bills before and during its bankruptcy soon thereafter.

Plainly, what the jury did was draw the logical deduction that TimeFire, having actually made prior sales (to Binary Financial) for a greater amount ($2,500) than the

[2] The remaining 10 PCBs were retained by TimeFire for further testing and to showcase to other potential buyers. At least two other third parties had solicited TimeFire to purchase these PCBs.

price HashFast charged under fire-sale conditions ($1,500), could have sold 222 PCBs for at least as much as HashFast's price. If anything, the calculation was conservative in AQS's favor.

On this record, we have no trouble concluding the evidence supporting the jury's award was " ' "of ponderable legal significance" ' " and was " ' "reasonable in nature, credible and of solid value," ' " and therefore sufficiently substantial to support the verdict and judgment. (*DiMartino, supra*, 80 Cal.App.4th at p. 336.) The evidence of the prior sale of 48 PCBs by TimeFire for $2,500 each, and the subsequent sale of the remaining 222 PCBs by HashFast for $1,500 each, was " 'evidence of reasonable reliability' " which established the " 'nature and occurrence' " of damages to TimeFire. (*Sargon, supra,* 55 Cal.4th at p. 774.) The fact of damages was undisputed and certain, and it is abundantly clear from the record that it was the " 'wrongful acts of [AQS] that have caused [TimeFire] to not realize a profit to which [it was] entitled.' " (*Id.* at p. 775.) The evidence of the past sales by TimeFire and HashFast provided the jury with a "reasonable basis" for computing damages to approximate lost profits as required by law. (*Id.* at p. 774.) A verdict in an amount slightly above $333,000 (222 x $1,500) and well below $555,000 (222 x $2,500) was supported by the evidence.

Even if there were not such a stark difference between this case and *Sargon* based on the strength of the evidence alone, the two cases are distinguishable for other reasons as well. Unlike in *Sargon*, there was no tiny fish comparing itself to a whale in this case. There is no indication in the record that HashFast or AQS maintained a substantially larger market share of the Bitcoin mining technology market than TimeFire. And unlike Sargon, TimeFire did not invite the jury to base its calculation of damages on pure speculation of grandiose hypothetical future achievements of the company. Nor did TimeFire invite the jury to make any inferences about the future of the company or make predictions that were not "grounded in the past." (*Sargon, supra*, 55 Cal.4th at p. 780.) Instead, TimeFire asked the jury to award damages based on actual past sales of the actual products at the heart of the dispute. The jury appears to have done exactly that. One of the oldest precepts in damages law in this state applies well here. Where AQS

"by [its] own wrong forced [TimeFire] into the strait of proving damages, [it] cannot complain that the latter used the best methods left" to make itself whole. (*Shoemaker v. Acker* (1897) 116 Cal. 239, 246.)

2. *AQS's Remaining Arguments: Deficient Evidence of Claimed Profit Margin, and Absence of Evidence of Like Sales or Imminent Sales*

Two remaining arguments advanced by AQS may be disposed of with only brief discussion.

First, AQS argues that the damages awarded TimeFire were improper because HashFast had incurred additional labor and financial costs to make the 222 PCBs function at the expected 800 gigahash per second threshold. As such, according to AQS, $337,000 is not a fair calculation of TimeFire's lost profits because it does not take into consideration those additional costs that TimeFire may have ultimately incurred, according to HashFast's estimation of additional costs needed to make the boards perform as promised. We are unpersuaded. The dispute in this case is between AQS and TimeFire regarding AQS's failure to meet its contractual obligation to deliver 222 PCBs to TimeFire. It is not a dispute between HashFast and TimeFire regarding, in effect, "change order" charges that HashFast might have tried to recoup for additional expenses incurred by HashFast assisting in the development of the PCBs. Presumably, in any event, the $1,500 "discounted" price HashFast itself charged—and the jury appears to have used—already reflects the costs HashFast felt it needed to recoup in order to make a profit.

Second, AQS argues that TimeFire offered no evidence to show that it was in negotiations with, knew of, or would have sold the PCBs to the same customer that HashFast sold them to and therefore the jury's verdict was not supported by substantial evidence. In a variation on this line of argument, AQS also argues the jury verdict was not supported because TimeFire did not offer substantial evidence that it was in negotiations, or had a contract, to sell the boards to someone other than the customer to which HashFast sold them. Neither version of this attack on the evidentiary basis for the damages award has any substance. AQS cites no case law to support the theory that hard

evidence of like sales or imminent sales is a necessary predicate to recovery of "[p]ast economic loss including lost profits" of the kind that was awarded here. The best precedent AQS offers is the federal district court opinion in *ProMex, LLC v. Hernandez* (C.D.Cal. 2011) 781 F.Supp.2d 1013, which is not binding here, or for that matter anywhere else other than the case in which it issued.

Upon reviewing the whole record in the present case " 'in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court,' " we conclude that there is sufficiently substantial evidence to support the verdict and judgment. (*DiMartino*, *supra*, 80 Cal.App.4th at p. 336.) As such, there was no abuse of discretion by the trial court in denying AQS's motion for a new trial on damages.

III. DISPOSITION

Affirmed.

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STREETER, J.

WE CONCUR:

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POLLAK, P.J.

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TUCHER, J.